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Supreme Court, U.S
FILED

No. 03 - 79 MAY 9 - 2003

IN THE

Supreme Court of the United States

MANUEL GONZALEZ-GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL APPENDIX

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Dated: July 9, 2003

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MANUEL GONZALEZ GONZALEZ,

Petitioner,

v.

CIVIL ACTION NO. 99-2207 (PG)
CRIMINAL NO. 93-318 (PG)

UNITED STATES OF AMERICA,

Respondent

REPORT AND RECOMMENDATION

Petitioner's motion for post-conviction relief under 28 U.S.C. §2255 was referred to this Magistrate. Upon receipt of the available transcripts and with copy of the Clerk's Office docket sheets, the record has been reconstructed. Several issues raised by counsel as to discovery have already been ruled by this Magistrate through separate orders. No evidentiary hearing is deemed necessary and the matters relevant to resolve this post-conviction petition are discussed below.[1]

The case was originated in 1993 after a federal grand jury charged above petitioner and other individuals with several offenses, including importation of controlled substances, to wit; cocaine and marihuana, as well as a related conspiracy. A direct appeal from his conviction, motions for new trial, and appeal thereof, in addition to appeal from entry of forfeiture are part of the record. All of the

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[1] A hearing on post-conviction motions is not necessary where a defendant's claim is "conclusively refuted as to the alleged facts by the files and records of the case". United States v. Carbone, 880 F.2d 1500, 1502 (1st Cir. 1989).

above referred have been duly examined and considered by this Magistrate.

Ineffective assistance of counsel:

Petitioner claims that counsel failed to present other witnesses to delve with the allegation that a government's witness had benefited from lenient treatment of close relatives and such strategy amounted to ineffective assistance. Such claim is not substantiated by an examination of the trial record. The affidavits of counsel Aponte and Castillo were received and duly considered. Trial counsel had ample opportunity to cross-examine the government's main witness, including questions before the jury's presence as to motive and possible benefits related to the issue raised in the petition that his mother and brother were not charged or prosecuted.[2] A district court must evaluation counsel's performance from counsel's perspective at the time, in light of the totality of the circumstances. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional competence. Lema v. United States, 987 F.2d 48 (1st Cir. 1993) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)). The decision whether to call a particular witness is almost always strategic. Counsel did not fail to investigate the defense aspect raised in the petition.

The possible impeachment of Luz Marina Giraldo's testimony through her statements prior to the trial, should be contemplated together with the known fact that it was not until the fourth day of trial, as recognized by petitioner's counsel closing arguments, that she decided to enter a plea of guilty and agree to cooperate with the government against co-defendant. Up to that time, she was sitting at the

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[2] Transcript 2-1-96, pp. 1226-1227, 1231; Tr. 2-2-96, pp. 1251, 1322-1323; Tr. 2-5-96, pp. 1399.

defense table. Not only her own benefit in making a deal thereafter with the government was presented by defense counsel for petitioner, but arguments to impeach her testimony as a scorned lover, were also submitted before the jury.[3] Thus, the jury was made aware of this witness' possible self-interest and could assess her credibility within the required parameters, including her previous denial of petitioner's participation in the offense through letters while they were both in jail, awaiting trial. Petitioner's arguments that counsel failed to submit impeachment evidence as to Luz Marina's testimony insofar as what she had said on prior occasions is belied by the record.[4] In addition, this was not the only co-conspirator who testified against defendant; to wit; Ricardo Rivero and Roberto Garraton-Rivera also testified as to the defendant's drug trafficking activities. Other cooperating witness and an undercover FBI agent additionally testified, together with recorded conversations, surveillance photos, passport entries, travel, and telephone records, as to the charged illegal activities. Petitioner was not facing a judicial proceeding in which the government's burden was less than compelling.

Counsel and defendant were provided with the recording of conversations between the government's informants and the defendants, as well as the transcripts. Regarding the issue that transcripts presented through the pointer system were highlighted and not fully preserved as presented, the jury entertained the taped recordings, not the

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[3] Transcript 2-14-96, pp. 2425-2426.

[4] This issue was also raised in defendant's appeal where it was determined that there was no reasonable probability that the jury, had it known the true extent and earlier dated of her cooperation with the government, would have reached a different verdict.

transcripts of said conversations, as instructed that transcripts were not evidence.[5]

Apprendi claim:

There was evidence during trial as to the conspiracy and the importation charges related to the amount of the loads of controlled substances.[6] The prosecutor's closing statements summarizes these events and amounts of controlled substances were attributed to the conspiracy through the testimonies of numerous witnesses[7]. The Apprendi[8] issue raised by petitioner in the supplemental motion should also be subject to summary dismissal. In Apprendi, the Supreme Court held that the due process clauses of the Fifth and Fourteenth Amendments make the jury the proper decision maker and the reasonable doubt standard is the proper burden, when a fact raises the maximum lawful punishment. This is only applicable in situations where "the judge-made factual determinations increases the maximum sentence beyond the statutory maximum, and not in situations where the defendant's potential exposure is increased within the statutory range." United States v. Baltas, 236 F.3d 27, 41 (1st Cir. 2001). Finally, defendant was sentenced by the Court within the sentencing

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[5] Transcript 2-2-96, p. 1181; Id. 1188; Tr. 2-5-96, p. 1523.

[6] A total of 12 bags of marihuana for 58 pounds, and 204 blocks of cocaine, for 478 pounds examined as testified by the expert witness at trial. (Tr. 2-5-96, pp. 1359-1361). Other witness' testimony also made reference to the 625 kilos arranged to be imported into Puerto Rico and part thereof was transported to New York (Tr. 2-5-96 pp. 1427-1466, 1472-1476), as well as participation in other substantial importations (Id. pp. 1504-1515). See also reference to transportation of 69 kilos of cocaine and of 20 kilos of cocaine (Tr. 1-24-96, p. 399; Tr. 1-25-96, p. 438).

[7] Transcript 2-14-96, pp. 2371-2382, 2384, 2386.

[8] Apprendi v. New Jersey, 530 U.S. 466 (2000).

guideline range of his conviction and same became final back in 1998 with denial of the *certiorari* filed before the Supreme Court subsequent to the direct appeal decision of February 5, 1998.[9] Furthermore, the arguments raised under Apprendi fail to present a challenge to the conviction nor to the question of guilt or innocence in this post-conviction motion.

Claim of use of highlighted portions of transcripts by the prosecution:

Petitioner's claim, that the witness was allowed to interpret and misconstrue the recorded conversations, fails to address the coded nature of the language used by the participants.[10] Counsel for petitioner argued that there was no specific drug talk in the tape recordings, except for the explanations provided by the government's witness that interpreted the coded talk as drug talk.[11] The jury would not have fully comprehended the nature of the conversation without the witness' explanations. The trial court discussed the issue and determined, without finding, there was no discrepancy pointed out between the transcripts and the recorded conversations nor of what was played in the monitors. Defendant was given an opportunity to play, in addition, any tape he wanted to present into evidence or all of them. Thus, a review of the record belies the petitioner's allegation that the jury was provided with

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[9] As this Court has held on numerous occasions, "[n]o Apprendi violation occurs when the district court sentences a defendant below the default statutory maximum". United States v. Barnes, 244 F.3d 115, 119 (1st Cir. 2001). United States v. Campbell, slip op. No. 00-2493 (1st Cir. October 11, 2001), 2001 WL 1181100.

[10] Transcript 1-29-96, p. 907; Tri. 1-30-96, p. 1017; Tr. 1-31-96, p. 1060; Id. p. 1063; Tr. 1-30-96, p. 959; Id. p. 962; Tr. 2-1-96, pp. 1218-1223; Tr. 2-2-96, pp. 1258-1259, 1268.

[11] Transcript 2-14-01, p. 2419.

highlighted transcript and in fact defendant addressed the Court indicating the transcripts were exactly a copy of what was said on the tapes. As to redacted portion of three pages considered irrelevant to the matter being tried, the Court made then a ruling and defendant, who also had the tapes, could have played same to the jury as part of his defense strategy.[12]

Court Rulings:

Petitioner raises that the Court failed to allow him *pro-se* representation as he initially requested. The record shows defendant requested the Court for his participation in certain parts of the case but not for the resignation of his counsel. Prior to trial, at the Carbone hearing held after a trial date was already scheduled, defendant indicated he would not appreciate any further continuances to be granted. At that time, no mention of a request for *pro-se* representations was then made. To the contrary, defendant indicated Attorney Moskowitz would still represent him and he wanted that, if possible, legal representation be one between counsel and defendant, that is, so he would take part in his own defense.[13] The Court considered and discussed the defendant's petition at trial and indicated to defendant he not only lacked legal training but had also to protect the rights of other defendants in the case, who opposed the defendant's participation since he could prejudice their clients.[14] Still, the record does not show the defendant requested full *pro-se* representation nor made any petition to waive counsel, but rather to extend his participation. On the first day of trial, the record further shows that, if

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[12] Transcript 2-9-96, pp. 1983-1989; Id. 1991.

[13] Transcript 12-7-95, pp. 4-7.

[14] Transcript 1-22-96, pp. 4-10; Tr. 2-23-96, pp. 4-11.

anything, defendant first considered he have had hybrid representation and complained about not meeting with his local, not his state counsel, and that because of the limitations imposed by his incarceration he was not personally able to help his attorney with the facts. It was on the same day of trial and after considering the Court had denied his petition to actively participate, with the opposition of other defendants, that defendant again indicated he would like to proceed *pro-se*, but still with the aid of counsel.

Other issues raised by petitioner:

Defendant has additionally raised ineffective assistance by appellate counsel. The government submitted an affidavit of Attorney Besser stating not having seen merit as to issues except for the ones ultimately raised on appeal, as it was his professional opinion, upon consultation with defendant. Notwithstanding, petitioner has raised those and numerous other issues through his subsequent motions for new trial and the appeal thereof, all found finally without merit.[15] The ineffectiveness of counsel on appeal claim should be subject to summary dismissal.

Evidence as to money laundering was objected by counsel and denied by the presiding court since the evidence of money laundering was related to the drug conspiracy charges.[16] A similar evidentiary ruling was made by the trial court as to the defendant not being a tax payer and that he owned cattle, which was also consequence of his defense as to sources of

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[15] The Court of Appeals for the First Circuit had in addition a Petition for Rehearing and Permission to File Supplemental Brief presenting the issues of appellant not raised by his counsel which was subsequently denied. See Order of February 26, 1998, No. 96-2280.

[16] Transcript 1-25-96, p. 566; Tr. 2-1-96, pp. 1195-1196.

income and as relevant to the conspiracy.[17] Still, even an erroneous evidentiary ruling, which is not the above discussed, would require jury verdict to be vacated only if such ruling excluded evidence and the exclusion resulted in actual prejudice. On appeal, review would have been under abuse of discretion standards and petitioner has not presented grounds for ineffectiveness of counsel for not presenting those issues to the Court of Appeals.

As to those issues previously raised by petitioner's through his direct appeal and/or the motions for new trial, these need not be reviewed again by way of a motion for post-conviction relief.[18] Dirring v. United States, 370 F.2d 862, 864 (1st Cir. 1967) cited in Barrett v. United States, 965 F.2d 1184, 1190 n.11 (1st Cir. 1992). See also Singleton v. United States, 26 F.3d 233 (1st Cir. 1994).

In light of the above discussed, this magistrate is of the opinion and recommends that the plethora of claims raised in petitioner's motions for post-conviction relief requested BE DENIED.

IT IS SO RECOMMENDED.

The parties have ten (10) days to file any objections to this report and recommendation. Failure to file same within the specified time waives the right to appeal this order. Henley Drilling Co. v. McGee, 36 F.3d 143, 150-151 (1st Cir. 1994); United States v. Valencia, 792 F.2d 4 (1st Cir. 1986).

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[17] Transcript 2-9-96, pp. 2010-2011.

[18] United States v. Manuel Gonzalez-Gonzalez, slip op. No. 00-2014, (1st Cir. July 19, 2001); United States v. Gonzalez-Gonzalez, 106 F.Supp.2d 269 (1st Cir. 2000); United States v. Gonzalez-Gonzalez, 136 F.3d 6 (1st Cir. 1998). See also Manuel Gonzalez Gonzalez v. United States, slip op. No. 00-1564 (1st Cir. July 23, 2001).

In San Juan, Puerto Rico, this 30th day of October, 2001.

J. ANTONIO CASTELLANOS
UNITED STATES MAGISTRATE JUDGE